**American Eagle Protective Services Corporation and Paragon Systems, Inc. *and* United Government Security Officers of America, Local 034, Affiliated with United Government Security Officers of America International Union.** Case 05–CA–126739

July 27, 2018

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

The General Counsel seeks summary judgment in this compliance proceeding on the basis that the Respondents' answers and affirmative defenses to the compliance specification raise matters that have been decided in the underlying unfair labor practice proceeding and are insufficient under the Board's Rules and Regulations. We grant the General Counsel's motion for summary judgment because we agree that the Respondents' asserted defenses to compliance with the make-whole provision of the Board's previously issued order are effectively untimely challenges to the order itself.[1]

On November 4, 2015, the Board issued an unpublished order adopting, in the absence of exceptions, an administrative law judge's decision finding that the Respondents, American Eagle Protective Services Corporation and Paragon Systems, Inc., violated Section 8(a)(5) and (1) of the National Labor Relations Act (the NLRA or the Act).[2] Pertinently, the judge found that the Respondents violated the Act by discontinuing employees' contractual right to receive an hourly health-and-welfare benefit as wages and instead applying that benefit to a companywide health insurance plan or, if employees could show proof of outside insurance coverage, contributing it to a company-sponsored 401(k) retirement plan. The judge ordered that the Respondents:

> [o]n the request of the Union on behalf of any or all affected employees, pay the employees, as a lump-sum payment, the total amount of health and welfare contributions made on the employees' behalf by Respondents to the employee's 401(k) account between October 28, 2013 and October 16, 2014. Respondents shall pay all costs, fees, and tax consequences associated with the withdrawal of these monies from employees' 401(k) accounts.

As stated, the Respondents did not file exceptions to the judge's order.

On February 28, 2017,[3] the Regional Director for Region 5 issued a compliance specification and notice of hearing, alleging the amounts due and notifying the Respondents of their obligation to file a timely answer complying with the Board's Rules and Regulations. On April 3, the Respondents filed an answer, which generally denied all allegations in the compliance specification and asserted three affirmative defenses.[4]

On April 6, the General Counsel moved for summary judgment on the compliance specification, stating that the Respondents' answer failed to meet the specificity requirements of the Board's Rules and Regulations. The General Counsel noted that the Respondents did not dispute the figures or calculations set forth in the compliance specification.

On April 10, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On April 12, the Respondents filed an amended answer to the compliance specification. The Respondents denied all but one allegation in the compliance specification "to the extent [the specification] implies that Respondents can circumvent federal income tax responsibilities and other obligations imposed by ERISA."[5] The Respondents asserted two additional affirmative defenses: "full compliance . . . is impossible because making certain payments or contributions would require Respondents to violate federal law," and under the compliance specification "employees receive an unjust windfall that goes beyond the scope of permissible recovery under the NLRA."[6]

In an April 21 response to the Board's Notice to Show Cause, the Respondents provided more context for the first of these defenses.[7] The Respondents argued that "strict compliance" with the judge's make-whole remedy

[1] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Member Emanuel is recused and took no part in the consideration of this case.

[2] Administrative Law Judge Eric M. Fine issued his decision on September 22, 2015.

[3] All subsequent dates are in 2017.

[4] The affirmative defenses included (1) a denial that the Respondents engaged in or are engaging in any unfair labor practices as alleged in the underlying complaint, (2) an assertion that, to the extent any allegations were not made and expressly included in an unfair labor practice charge filed within 6 months of the alleged violation, the allegations are time-barred, and (3) a denial of each and every allegation in the underlying complaint.

[5] The Respondents admitted the allegation that the backpay period begins on October 28, 2013, and continues through October 16, 2014.

[6] The Respondents also asserted that "damages . . . should be reduced due to the employees' failure to mitigate their damages."

[7] The Respondents did not further address their "unjust windfall" affirmative defense.

would require "forcing withdrawal" of unlawfully contributed funds from employees' 401(k) accounts. The Respondents further argued that this forced withdrawal was legally impossible because it would violate the Internal Revenue Code (IRC).[8] Accordingly, the Respondents argued that the Board should deny the General Counsel's motion and set this case for a hearing before an administrative law judge to consider an "alternate remedy."

On the entire record, the Board makes the following

Ruling on Motion for Summary Judgment

The Respondents' refusal to comply with the disputed make-whole provision of the Board's Order is premised on two principal affirmative defenses: (1) it is legally impossible to comply with the make-whole provision because the Respondents may not withdraw funds from employees' 401(k) accounts, and (2) the Respondents' only alternative—making employees whole by using the Respondents' own funds—would result in an improper windfall to employees. We reject these defenses because they are untimely.

It is well settled that "[i]ssues litigated and decided in an unfair labor practice proceeding may not be relitigated in the ensuing backpay proceeding." *Paolicelli*, 335 NLRB 881, 883 (2001); see also Sections 101.12(b)[9] and 102.48(a)[10] of the Board's Rules and Regulations. Here, by their own words, the Respondents attempt to relitigate a matter that was squarely before the judge; they pursue their impossibility and windfall defenses in an effort to secure an "alternate remedy." By choosing not to file exceptions to the judge's recommended Order, the Respondents chose not to question whether the circumstances here required a different make-whole remedy, and the Board adopted the judge's Order pro forma. The Respondents do not and cannot contend that their affirmative defenses are premised on any ground that did not exist, or was not reasonably apparent, at the time the judge issued his decision and recommended Order. Accordingly, we find that the Respondents are barred from raising these affirmative defenses at the compliance stage of this proceeding. See *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616, 1618 (2001) (in compliance proceeding, employer waived its right to "raise the question of whether the circumstances required a different backpay formula" than that applied by the judge, where the employer failed to file exceptions to the formula at the unfair labor practice stage).[11]

Although unnecessary given their untimeliness, we would also reject these defenses on the merits. Contrary to the Respondents, the Board's Order does not require the Respondents to withdraw funds from employees' 401(k) accounts to make employees whole. Rather, the Order simply provides that *should* the Respondents choose to derive lump-sum payments from employees' 401(k) accounts, the Respondents will bear any financial and tax consequences. The Respondents are perfectly free to make employees whole from their own funds. As for the Respondents' and our dissenting colleague's argument that making employees whole from the Respondents' own funds would result in an improper windfall, the Board has rejected that argument in similar circumstances, and we see no reason to revisit that issue here. See *Harding Glass Co.*, 337 NLRB 1116, 1118 (2002) (rejecting employer's argument that making contributions owed to contractual benefit funds, without an offset in the amount of payments made to an alternative plan, "would afford a windfall to the funds, and [is] punitive and inconsistent with the remedial purposes of the Act").

Finally, we find that the Respondents' remaining responses to the allegations of the compliance specification, which are general denials of matters within the Respondents' knowledge, do not comply with the require-

[8] More specifically, the Respondents argued that complying with the Board's Order would be legally impossible because (i) withdrawals of funds from employees' 401(k) accounts to satisfy the Board's make-whole remedy would qualify as non-hardship distributions; (ii) the IRC prohibits non-hardship distributions for employees under the age of 59½ and accordingly, the Respondents' 401(k) Plan prohibits such distributions; (iii) if the Respondents amended their 401(k) Plan to permit such distributions, this would cause the 401(k) Plan to lose its tax-favored status under the IRC; and (iv) loss of tax-favored status would diminish all participating employees' retirement savings.

[9] Sec. 101.12(b) provides:

> If no exceptions are filed, the administrative law judge's decision and recommended order automatically become the decision and order of the Board pursuant to section 10(c) of the Act. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes.

[10] Sec. 102.48(a) provides:

> If no timely or proper exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge's decision will, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions must be deemed waived for all purposes.

[11] We reject the Respondents' remaining affirmative defenses. The defenses noted above, see supra fn. 4, plainly demonstrate an effort to relitigate issues already decided in the unfair labor practice case—namely, the Respondents' liability under the Act. We also reject the Respondents' mitigation defense (see supra fn. 6). The losses suffered by the Respondents' employees were caused by unlawful unilateral changes, not loss of employment. Where employees suffer no cessation of employment, they have no duty to mitigate damages by seeking interim employment. See *Mimbres Memorial Hospital & Nursing Home*, 361 NLRB 333 (2014).

ments of Section 102.56(b) and (c). Accordingly, we find the allegations in the compliance specification to be admitted as true and shall grant the General Counsel's Motion for Summary Judgment. We conclude, therefore, that the amounts due are as set forth in the compliance specification, and we will order the Respondents to pay these amounts, plus interest accrued to the date of payment.[12]

## ORDER

The National Labor Relations Board orders that the Respondents, American Eagle Protective Services Corporation and Paragon Systems, Inc., their officers, agents, successors, and assigns, shall make whole the individuals named below by paying them the amount following their names, plus interest accrued to the date of payment as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), minus withholdings required by Federal and State laws.[13] Should the Respondents make employees whole through withdrawal of funds from employees' 401(k) accounts, the Respondents shall pay all costs, fees, and tax consequences associated with any such withdrawals.

| **Employee** | **Health & Welfare Allowance** |
|---|---|
| Akinsusi, Isiaka | $7941.69 |
| Allen, Michael | $7647.93 |
| Allotey, Abraham | $8756.24 |
| Artis, Sharon | $8391.19 |
| Asua, Idongesit | $6867.14 |
| Beckett, Stephanie | $8777.13 |
| Braxton, Kia | $ 892.84 |
| Brooks, Ayondela | $7564.33 |
| Brown, Douglas | $5803.58 |
| Bryant, Cynthia | $8145.15 |
| Coffer, Kevin | $5686.03 |
| Collier, Chandra | $8504.25 |
| Cooper, Darryl | $5610.86 |
| Corbbins, Nerissa | $8844.54 |
| Curry, Steve | $8178.62 |
| Day, April | $7793.99 |
| Dayne, Jerome | $8636.00 |
| Dildy, Jon | $7895.38 |
| Dinkins, Jocelyn | $3307.61 |
| Fawehinmi, Tos | $8244.30 |
| Fitzgerald-Walker, Timisha | $8277.79 |
| Frazer, Glen | $8418.95 |
| Frierson, Michael | $ 291.54 |
| Gaines, Sherrie | $7864.07 |
| Gauf, Ricardo | $8094.51 |
| Gerald, Joseph | $7677.76 |
| Green, Lesley | $7710.26 |
| Hargrove, Marlon | $7348.06 |
| Hargus, James | $ 670.56 |
| Hayes, Warren | $ 600.68 |
| Holmes, Ebony | $ 145.73 |
| Horne, Rodney | $8702.40 |
| Iwuagwu, Nnaemeka | $8689.45 |
| Jackson, Joseph | $8781.54 |
| Johnson-Bey, Kennard | $7237.24 |
| Jones, Quiana | $7985.45 |
| Jones, Sharon | $ 531.21 |
| Kelly, Rashunda | $8595.44 |
| King, Lawanda | $7276.78 |
| Knight, Rodger | $7449.21 |
| Lee, Lamont | $5513.66 |

[12] We disagree with the alternative approach proposed by our dissenting colleague. He would permit the Respondents to recoup unlawfully contributed 401(k) funds from employees by requiring employees to initiate distributions from their 401(k) accounts. Our colleague asserts that the Respondents have made a "colorable" argument that they would run afoul of Internal Revenue Service ("IRS") regulations were they to unilaterally withdraw the money from employees' 401(k) accounts. Again, whether this argument is colorable or not, it should have been made in the form of timely exceptions to the judge's decision, not during this compliance proceeding. The Respondents did not do so. In any event, because nothing in the Board's Order requires the Respondents to unilaterally withdraw funds from the 401(k) accounts, nothing in that Order requires them to potentially violate any IRS regulation. With lawful options not clearly foreclosed by the plain language of the Board's Order, we assume the Respondents will conduct themselves in accordance with all applicable laws and regulations.

Further, we reject our dissenting colleague's proposed remedy because it would effectively require employees to make themselves whole. The Board has rejected recoupment in similar circumstances, and we would do so here for the same reasons. See *Alamo Rent-A-Car*, 362 NLRB No. 135, slip op. at 1 fn. 1 (2015) (barring employer from recouping from employees union dues the employer unlawfully failed to deduct and remit to a union), enf. 831 F.3d 534 (D.C. Cir. 2016). The possibility that unlawfully contributed funds might remain in employees' 401(k) accounts after employees receive make-whole relief does not merit denying the General Counsel's Motion for Summary Judgment. That issue has already been decided by the Board and we do not revisit it here. See *Harding Glass*, 337 NLRB at 1118 (quoting *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983) ("'[A]n employer cannot complain of the extra cost of improperly created, substitute fringe benefits . . . The company is merely required to repay what it has unlawfully withheld . . . [I]t was the company that unlawfully chose to incur the additional expense of a private insurance program.'").

[13] These amounts do not yet include any excess tax. As set forth in the compliance specification, the Respondents are also liable for any adverse tax consequences for employees receiving a lump-sum payment. Although the compliance specification calculated the adverse tax consequences, those amounts may be updated to reflect the actual date of payment. See *Campaign for the Restoration and Regulation of Hemp, THCF*, 366 NLRB No. 15, slip op. at 1 fn. 3 (2018). Any adverse tax consequences shall be reported in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016); *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

| | |
|---|---|
| Mensah, Emmanuel | $7669.89 |
| Miles Jr, Ronald | $8253.86 |
| Montgomery, Andrea | $ 743.97 |
| Mozon-Whitfield, Laminda | $8751.90 |
| Newby, Michael | $2779.97 |
| Oguayo, Chima | $8695.73 |
| Osakwe, George | $4887.30 |
| Ottoway, Rodney | $ 704.00 |
| Owusu-Ansah, Samuel | $6546.82 |
| Petway, Kimberly | $8342.22 |
| Proctor, Tricia | $7856.93 |
| Pugh, Michael | $8102.30 |
| Robin, Reginald | $7501.62 |
| Sanni, Fatai | $8816.90 |
| Singleton, Darryl | $8542.38 |
| Sizing, Adomawayi | $8346.78 |
| Stewart, Kimberly | $8185.14 |
| Sullivan, Jean | $7708.05 |
| Swann, Carla | $8305.08 |
| Swann, Thurone | $7485.64 |
| Tabbs, Catherine | $4063.15 |
| Tilghman, Daphne | $8222.29 |
| Upchurch, Althea | $6008.41 |
| **Total** | $427,871.42 |

Dated, Washington, D.C. July 27, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting.

The question presented in this compliance case is what the Respondents must do to make employees whole for the Respondents' unlawful decision to cease providing employees the amount of a health-and-welfare benefit as wages and instead contributing that amount to employees' 401(k) accounts. The Respondents and the General Counsel interpret the Board's Order to require the Respondents to withdraw the unlawfully contributed funds from employees' 401(k) accounts and pay it to them with interest. My colleagues and I agree that this was not the Board's intent. Accordingly, the Board's Order must be clarified. My colleagues, however, choose an alternative remedy that may result in a windfall to employees because they would receive remedial payments while retaining the 401(k) contributions. The Board lacks the authority to provide the remedy my colleagues have selected. As explained below, there is another alternative that fully remedies the unfair labor practice without giving employees a windfall. I would choose that alternative.

It is firmly established that the Board's powers under Section 10(c) of the Act are remedial, not punitive. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11–12 (1940); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235–236 (1938); *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348, 1353 (2007) ("[I]n exercising its remedial discretion, the Board is obligated to ensure that its remedies are compensatory and not punitive, and to guard against windfall awards that bear no reasonable relation to the injury sustained."), pet. for review dismissed 561 F.3d 497 (D.C. Cir. 2009); *Taracorp Inc.*, 273 NLRB 221, 223 (1984) ("[T]he Board may not order punitive remedies. . . . Nor should our remedies serve as a windfall to employees or employers."). Accordingly, the Board's objective when remedying an unfair labor practice is to restore "the situation, as nearly as possible, to that which would have obtained but for" the unfair labor practice. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).[1] Moreover, the Board has an obligation to harmonize its enforcement of the National Labor Relations Act with other Federal statutes. See *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

Here, the Board's Order provides as follows:

> On the request of the Union on behalf of any or all affected employees, pay the employees, as a lump-sum payment, the total amount of health and welfare contributions made on the employees' behalf by Respondents to the employee's 401(k) account between October 28, 2013 and October 16, 2014. Respondents shall pay all costs, fees, and tax consequences associated with the withdrawal of these monies from employees' 401(k) accounts.

On its face, the Board's Order at the very least contemplates that the Respondents *may* unilaterally withdraw the amounts previously deposited to employees' 401(k) accounts and redistribute those amounts to employees as a make-whole payment. If the Respondents followed this procedure, they would restore employees to the situation that would have obtained but for the Respondents' unfair labor practice:

[1] See also *PCMC/Pacific Crane Maintenance Co.*, 362 NLRB No. 120, slip op. at 2 fn. 4 (2015) (recognizing that parties may litigate in compliance whether make-whole payments may be offset by payments the employer previously made); *Grondorf, Field, Black & Co. v. NLRB*, 107 F.3d 882, 888 (D.C. Cir. 1997) (same).

employees' health-and-welfare benefits would not be included in their 401(k) accounts, but instead would be paid to them as wages. And this procedure would not result in a windfall to employees.

The Respondents, however, have raised a colorable argument that their unilateral withdrawal of funds from employees' 401(k) accounts would run afoul of the Internal Revenue Code.[2] Employees, however, may initiate these withdrawals, although doing so would result in additional costs.[3] To address these concerns, I would clarify the Board's Order as follows.

> (i) Employees may elect to make a distribution from their 401(k) accounts equal to the amount unlawfully contributed to their 401(k) accounts by the Respondents, in which case the Respondents shall be obligated to pay interest accrued to the date of payment and all costs, fees, and tax consequences of the distribution. If the 401(k) account value of the unlawfully contributed funds is less than the amount owed to employees, which might be the result of a loss of return on investments, additional administrative costs, etc., the Respondents will be obligated to make up any difference.
>
> (ii) Alternatively, employees may elect to leave the unlawfully contributed funds in their 401(k) accounts, in which case they are not entitled to any make-whole relief.

With this clarification, the Board's Order would fully remedy the unfair labor practice while obviating any potential conflict with the Internal Revenue Code.

My colleagues agree that the parties have misinterpreted the Board's Order to *require* withdrawals from employees' 401(k) accounts,[4] but the clarification they offer is that the Respondents can use their own funds to provide make-whole payments. Under this procedure, employees would receive an obvious windfall, inasmuch as they would retain the 401(k) contributions while still receiving make-whole payments pursuant to the Board's Order, with interest. While this procedure might be permissible if it were the only available method for remedying the Respondents' unfair labor practice, as shown above, it is not. Accordingly, the Board lacks the authority to impose it. See *Taracorp*, 273 NLRB at 223; *Oil Capitol Sheet Metal*, 349 NLRB at 1353.

Finally, it bears emphasis that the parties have litigated this case on the premise that the make-whole payments must come from the employees' 401(k) accounts. Regardless of whether the majority is modifying the Board's Order or merely clarifying it, the fact remains that the parties have had neither notice nor opportunity to be heard regarding the remedial alternative the majority now offers. Granting summary judgment on the ground that there are no litigable issues of fact or law is especially unwarranted in these circumstances.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. July 27, 2018

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

[2] Specifically, the Respondents argue that the Internal Revenue Code does not permit such distributions from 401(k) accounts and that making those distributions would render the plan invalid under the Internal Revenue Code.

[3] The Internal Revenue Code permits *participants* in a 401(k) plan to request distributions under any circumstances so long as the participant pays income tax on the distribution and an additional 10 percent tax penalty. See IRS Retirement Topics – Exceptions to Tax on Early Distributions, available at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-tax-on-early-distributions (last visited July 27, 2018). The Region appears to have expressly contemplated that this would be a valid method of complying with the Board's Order. In a January 2017 email to the Respondents' counsel, the Region's compliance officer questioned "why an employee cannot elect a withdrawal of the money, with tax and penalties assessed."

[4] Because the parties litigated this case on the premise that the Board's Order required the Respondents to obtain make-whole funds from affected employees' 401(k) accounts, I view the majority's decision as a clarification of the Order whether expressed in those terms or not. It is well settled that "[t]he Board has the authority to entertain motions seeking clarification of its decisions and orders and to determine, on a case-by-case basis, whether such motions are timely." *Lourdes Health Systems*, 320 NLRB 97, 97 (1995). Accordingly, the Respondents' failure to file exceptions to the Board's Order does not preclude the Board from clarifying it at this time.